No. 14,727

United States Court of Appeals

For the Ninth Circuit

EVA ROSE BOLING,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

The appellant's statement of the case as recited in her brief with respect to the history of the instant lawsuit is essentially correct. However, the brevity of that statement does not give a true picture of the background of this litigation. This appeal deals solely with the propriety of the District Court's order dismissing the appellant's suit against the United States for want of prosecution. Therefore it is only proper that the entire chronicle of this extended litigation be called to the Court's attention. The appellee believes that the docket entries (R. 3-7) eloquently speak for themselves and constitute the true and complete "statement of the case" in this cause.

ISSUES PRESENTED.

It is the position of the appellee that:

(1) The District Court did not abuse, grossly or otherwise, its judicial discretion in dismissing appellant's complaint and cause of action for lack of prosecution;

(2) The District Court was not precluded from basing its orders of dismissal on events that transpired in this litigation prior to July 12, 1954.

ARGUMENT.

I. THERE WAS NO ABUSE OF DISCRETION IN GRANTING DISMISSAL.

The appellee does not take issue with the appellant's assertion, as stated in her brief (App. Op. Br.,* p. 5), that a trial court is inherently endowed with discretionary powers in dismissing litigation when diligent prosecution thereof is lacking. The appellant's citations, with which the appellee has no quarrel, amply support this proposition. We do not, however, agree with appellant's contention that mere abuse of discretion will alone suffice to reverse an order on appeal. In one of the leading cases on this subject, *Hicks v. Bekins Moving & Storage Co.,* 115 F. 2d 406 (9th Cir., 1940), this Court has held (at p. 409):

> ". . . Unless it is made to appear that there has been a *gross* abuse of discretion by the trial court in dismissing an action for lack of prosecution,

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*Appellant's Opening Brief.

its decision will not be disturbed on appeal." (Emphasis added.)

Sweeney v. Anderson, 129 F. 2d 756 (10th Cir., 1942).

The burden rests with the appellant to establish that, in granting the government's motion to dismiss for want of prosecution, the District Court *grossly* abused the discretionary power with which the appellant concedes it is inherently endowed. See *Gurst v. San Diego Transit System,* 119 Cal. App. 2d 51 (1953).

A review of the record and reading of appellant's brief discloses no conduct on the part of the trial court that could in any way be considered a manifest or gross abuse of discretion in dismissing the appellant's complaint and cause of action. No where does the appellant, by suggestion or inference, contend that the dismissal was a result of arbitrary, fanciful or clearly unreasonable conduct on the part of the District Court. The presence or absence of such conduct is determinative of whether or not there was a gross abuse of discretion.

United States v. McWilliams, 163 F. 2d 695 (D.C. Cir., 1947).

The appellant, in arguing in favor of reversal, asserts that her case was actively prosecuted from July 12, 1954, to December 29, 1954, and that this is sufficient to establish that there was no lack of prosecution so as to justify the District Court's granting appellee's motion to dismiss. This argument begs the

issue. The entire record must be considered in determining the propriety of the disputed order. An isolated five-months period of activity during approximately three and one-half years of litigation, is not sufficient to establish that there has been diligent prosecution on the part of the plaintiff *at every stage* of the proceedings. The fact that appellant was stirred into action after having one order of dismissal for lack of prosecution set aside, together with the attendant possibility that a similar order would be rendered against her if she did not expeditiously terminate her litigation, is no excuse for her past derelictions. (*Hicks v. Bekins Moving & Storage Co.,* supra.) Appellant's argument in this respect overlooks the duty imposed upon her to promptly dispose of her lawsuit from the very moment of its inception.

The clerk's docket shows (R. 4) that in 1953 the trial of January 3, 1953, was ordered off calendar at appellee's request. Thereafter appellant did nothing to prosecute her cause for a period of approximately eighteen months, or until June 1, 1954, when she made an ex parte application to have the dismissal of June 3, 1953, set aside (R. 42-47). This manifest lack of interest on the part of appellant refutes any contention on her part that she diligently prosecuted her lawsuit during every stage of its existence.

The appellant complains (App. Op. Br., p. 8) that the District Court did not indicate, in granting the motion to dismiss, the manner in which she was derelict in prosecuting her complaint. This assertion

is unfounded. The Court, in the order of dismissal of December 29, 1954 (R. 35-37), and in its amendment thereto of January 14, 1955 (R. 38-39), stated that the case was being dismissed because of the lack of activity on the part of the appellant, as evidenced by the entire record. Even before entering its formal order of dismissal, the District Judge indicated in open Court that he was inclined to dismiss because the case was then "stale". Appellant's counsel at that time and one of her counsel in this appeal agreed with the Court's, then, appraisal of the case (R. 72). Appellant was fully apprised and was more than adequately aware as to why her case was dismissed. It was not error on the District Court's part to omit spelling out, item by item, the derelictions committed by appellant; the record spoke for itself. In finding as it did, the Court was fulfilling one of the fundamental prerequisites as to the proper administration of justice—that there be an elimination of delay in the trial of cases and that the business of the courts be promptly dispatched by litigants.

Sweeney v. Anderson, supra.

Appellant contends that the affidavit of appellee in support of its motion to dismiss is devoid of any suggestion or showing that the appellant had been dilatory in prosecuting her lawsuit against the United States government. This assertion is not entirely correct. In this respect the appellant has studiously avoided any reference to the appellee's memorandum of points and authorities (R. 26-30) which accompanied the questioned affidavit. The Court's attention

is invited to this memorandum. It is hardly conceivable that anyone, after reading this document, would be unaware or misinformed as to the grounds on which the motion to dismiss was being presented to the Court. Such an argument as this has no bearing on the issues raised in this appeal. It only tends to becloud—a very clear and well established point of law concerning the inherent judicial power of courts to dismiss delayed litigation.

The argument of the appellant that the orders now appealed from were entered in the exercise of an abuse of judicial discretion is without merit. A reading of the record in this case, and an examination of appellant's brief, fails to establish any gross abuse of discretion on the part of the District Court in granting dismissal of this cause. As has been stated in *Hicks v. Bekins,* supra, in the absence of such a showing, an order such as is now before this Court for review is not susceptible to reversal on appeal.

II. THE DISTRICT COURT WAS NOT PRECLUDED FROM BASING ITS ORDER OF DISMISSAL ON EVENTS THAT TRANSPIRED IN THIS LITIGATION PRIOR TO JULY 12, 1954.

In her second specification of error (App. Op. Br., pp. 8-11), appellant argues that the District Court on December 29, 1954, was bound by a prior order of July 12, 1954, which restored her cause to the trial calendar, as an adjudication that there had been no want of prosecution at *any* time by the appellant. The appellant asserts that the order of July 12, 1954, was res judicata as to any question relative to appel-

lant's diligence or lack thereof in prosecuting her lawsuit against the United States. This proposition of appellant is based entirely upon the false premise that the order of restoration of July 12, 1954, was a final judgment.

Stripped of all of its legal refinements, the doctrine of res judicata is applicable only where there has been a *final* judgment after a full hearing on all the issues.

> *Heiser v. Woodruff,* 327 U.S. 726, 733 (1944); 30 Am. Jur., *Judgments,* § 172 (1940).

It cannot in any way be held that the order of Judge Hamlin made on July 12, 1954 (R. 15) was a final judgment so as to afford application of the doctrine of res judicata in this instance. The order was purely preliminary to any final adjudication on the merits; it simply settled a procedural defect in the litigation. The restoration order in no way touched upon the substantive rights of the parties as framed by the complaint and the answer. At the most the order was interlocutory.

> "An interlocutory judgment or order is one which is made before a *final* decision, for the purpose of ascertaining a matter of law or fact, preparatory to a final judgment, or which determines some preliminary or subordinate point or plea, or settles some *step,* question or *default* arising in the progress of the cause, but *does not adjudicate the ultimate rights of the parties* or finally puts the case out of Court." (Emphasis added.)
>
> *Taylor v. Breese,* 163 F. 678 (4th Cir. 1908): 31 Am. Jur., *Judgments,* § 434 (1940).

The order of July 12, 1954, was in effect a step which set aside appellant's default in allowing her case to be dismissed for lack of prosecution on June 3, 1953.

An interlocutory judgment or order is not susceptible to the defense of res judicata.

United States v. U.S. Smelting Co., 339 U.S. 186, 199 (1950);

United States v. One 1946 Plymouth Sedan, 167 F. 2d 3 (7th Cir. 1948).

The appellant states (App. Op. Br., p. 10) that in failing to seek a rehearing or appellate review of the order of restriction, the appellee is bound by its effect. The order, being interlocutory, was not in and of itself subject to appeal.

28 U.S.C. §§ 1291-1292.

The appellee's so-called failure to seek review of a non-appealable order was of no consequence and in no way limited its right to seek the recourse which it sought in subsequently moving for dismissal for want of prosecution.

The appellant's second specification of error is untenable and can in no way buttress her argument that the orders of dismissal were granted through the abuse of discretion on the part of the District Court.

CONCLUSION.

The record in this case and the arguments propounded by appellant fail to disclose that the District Court grossly abused its inherent judicial power in granting the dismissal in question. Likewise the District Judge, in granting the order of dismissal, was not bound by the order of July 12, 1954, under the doctrine of res judicata, but was fully justified in reviewing the entire record of this proceedings as an aid in determining there was want of prosecution on the part of the appellant.

The appellee respectfully submits that the orders appealed from should be affirmed.

Dated: San Francisco, California,
October 3, 1955.

Respectfully submitted,

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